Securities Regulation Daily Wrap Up, TOP STORY—CFTC grants brief extensions for rule comments in response to COVID-19 disruptions, (Apr. 13, 2020)

Securities Regulation Daily Wrap Up

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By Brad Rosen, J.D.

The CFTC extended comment periods for five pending proposed rules, while two commissioners asserted the brevity of the extensions rendered them meaningless.

The CFTC voted 3-2 to extend certain currently open comment periods in light of disruptions brought about by the COVID-19 (coronavirus) pandemic. The extensions address five separate rules proposed by the Division of Market Oversight (DMO) for which the current comment periods had started earlier in 2020. Commissioners Dan Berkovitz and Rostin Behnam issued sharp dissenting statements which asserted that the extensions were inappropriate and so short in duration so as to lack meaning.

Certain comment periods extended. The CFTC's press release, issued late on the Friday afternoon before the Easter holiday, provides details for each rulemaking and its respective extension as follows:

- Position Limits for Derivatives extended 16 days until May 15, 2020;
- SEF Requirements and Real-Time Reporting Requirements extended 32 days until May 22, 2020;
- Certain SDR and Data Reporting Requirements extended two days until May 22, 2020;
- Amendments to the Real-Time Public Reporting Requirements extended two days until May 22, 2020; and
- Amendments to the SDR Reporting Requirements extended two days until May 22, 2020.

Chairman claims extensions strike the right balance. Chairman Heath Tarbert declared, "I respectfully disagree with those who insist our important policy work could or should be put on pause." In support of the appropriateness of the extensions, he stated, "These extensions reflect my commitment to providing market participants with additional flexibility during this pandemic. Commenters on recently proposed rules will now have at least 90 days, and in many cases more, to provide feedback that we value tremendously as we seek to finalize rules."

Dr. Tarbert also noted that the swap data reporting proposals would give the Commission a more panoramic view into systemic risk by requiring for the first time the reporting of uncleared margin data and that the position limits proposal could help prevent corners and squeezes. In the chairman's view, the subject extensions strike the right balance to address the current circumstances.

Commissioner Berkovitz asserts extensions reflect bad public policy. Commissioner Berkovitz zeroed in on the inconsistency underlying the CFTC's extensions in his dissenting statement. He also observed that market participants and the public need more time to be able to provide high-quality comments on pending CFTC rulemakings in light of the disruptions resulting from the novel coronavirus pandemic. Moreover, he stated, "Not providing the public sufficient time to obtain additional perspective and develop meaningful comments in these extraordinary times is bad public policy."

Berkovitz also pointed to the COVID-19 related regulatory relief previously granted by the CFTC as clear evidence that the pandemic has disrupted normal operations of market participants. He also noted that many functions cannot be performed in a timely manner due to physical displacements and other extraordinary demands on market participants.

In a harsh criticism of the Commission's action, Berkovitz observed "The Commission's refusal to grant meaningful rulemaking comment period extensions stands in contrast to its swift recognition of requests by market participants for relief from the Commission's reporting and registration regulations." The commissioner added, "It is not clear why the Commission believes that market participants who state that it is difficult to comply with fundamental reporting or registration requirements nonetheless will be able to evaluate proposed rules and prepare comments with minimal delay." At a minimum, Berkovitz advocated that the Commission should extend all pending comment periods by 60 days, noting that the two-week and two-day extensions granted by the Commission today are inadequate.

Commissioner Behnam claims extensions are illusory. Commissioner Behnam, in his dissenting statement, observed for the three rules where the comment periods are extended for a mere two days, "That is not an extension at all. Instead, it is essentially an announcement that the Commission will not be extending these deadlines." He added, "For two of these rules, the comment period opened on February 20, so the entire comment period has essentially spanned the COVID-19 pandemic."

With respect to the comment period for the high-profile position limits rule which was extended by 16 days, Behnam observed, "Prior position limits proposals have garnered hundreds of public comments totaling thousands of pages. Producing these comments presumably takes months of work and careful thought by market participants and other stakeholders. Extending the deadline to May 15 as market and public health uncertainty continues is not sufficient."

Behnam has previously advocated for the CFTC to temporarily table all non-critical policy work and to shift its efforts and resources towards monitoring market and institutional stability and resiliency, and to consider necessary agency action that will alleviate market disruptions and support stable financial markets. Notwithstanding, the commissioner concluded by indicating his readiness to work with the chairman and fellow commissioners to reach agreement on meaningful extensions for the subject comment periods.

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